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 merger with Wells Fargo Bank Southwest, N.A.,
 8 f/k/a Wachovia Mortgage, FSB, f/k/a World
 Savings Bank, FSB ("Wells Fargo")
 9

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA – OAKLAND

12
 13 HEDDI LINDBERG,

14 Plaintiff,

15 v.

16 WELLS FARGO BANK, N.A., A/K/A
 WACHOVIA MORTGAGE as successor by
 17 merger with WORLD SAVINGS BANK, FSB;
 REGIONAL TRUSTEE SERVICES
 18 CORPORATION, and DOES 1 through 50,
 inclusive, and all persons unknown, claiming
 19 any legal or equitable right, title, estate, lien, or
 interest in the property described in the
 20 complaint adverse to Plaintiff's title, or any
 cloud on Plaintiff's title thereto, named as
 21 DOES 51-100, inclusive,

22 Defendants.
 23

CASE NO.: 4:13-CV-0808-PJH

[The Honorable Phyllis J. Hamilton]

**DEFENDANT WELLS FARGO BANK,
 N.A.'S MOTION TO DISMISS THE FIRST
 AMENDED COMPLAINT PURSUANT TO
 F.R.C.P. RULES 9 AND 12(b)(6)**

Date: May 15, 2013
 Time: 9:00 a.m.
 Ctrm: 3, 3rd Floor

24
 25 **TO PLAINTIFF AND HER COUNSEL OF RECORD:**

26 **PLEASE TAKE NOTICE** that on May 15, 2013, at 9:00 a.m. in courtroom 3, 3rd floor
 27 of the above-entitled Court, located at 1301 Clay Street, Oakland, California, the Honorable
 28 Phyllis J. Hamilton presiding, defendant Wells Fargo Bank, N.A., successor by merger with

Wells Fargo Bank Southwest, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB ("Wells Fargo"), will move to dismiss the first through eighth claims in the First Amended Complaint ("FAC"), pursuant to F.R.C.P. §§8 9 and 12(b)(6).

The entire FAC fails meet the Rule 8 pleading requirements. The additional ground are as follows:

1. First Claim for Relief: Declaratory

Plaintiff fails to state a claim for declaratory relief because: (i) any controversy has ripened into a claim; (ii) declaratory relief is unnecessary; (iii) this claim fails for the reasons the other claims fail and because Wells Fargo has the right to foreclose; and (iv) the claim for relief is preempted by the Home Owners' Loan Act ("HOLA").

2. Second Claim for Relief: Injunctive Relief

Plaintiff fails to state a claim for injunctive relief because: (i) injunctive relief is a remedy and not a claim for relief, not a claim for relief.

3. Third Claim for Relief: Intentional Infliction of Emotional Distress

Plaintiff fails to state a claim because: (i) the claim is preempted by HOLA; and (ii) plaintiff fails to properly plead the required elements.

4. Fourth Claim for Relief: Negligent Infliction of Emotional Distress

Plaintiff fails to state a claim because: (i) the claim is preempted by HOLA; and (ii) plaintiff fails to properly plead the required elements.

5. Fifth Claim for Relief: Quiet Title

Plaintiff fails to state a claim for relief because: (i) the claim is preempted by HOLA; and (ii) plaintiff has failed to allege the elements of quiet title.

6. Sixth Claim for Relief: Covenant of Good Faith and Fair Dealing

Plaintiff fails to state a claim for relief because: (i) the claim is preempted by HOLA; and (ii) plaintiff has failed to allege the elements of the claim.

7. Seventh Claim for Relief: Fraud

Plaintiff fails to state a claim for relief because: (i) the claim is preempted by HOLA; (ii)

1 fraud has not been pled with the required specificity; (iii) the claim is barred by the statute of
2 limitations; and (iv) plaintiff has failed to allege the elements of the claim.

3 **8. Eighth Claim for Relief: Fraud**

4 Plaintiff fails to state a claim for relief because: (i) the claim is preempted by HOLA; (ii)
5 fraud has not been pled with the required specificity; (iii) the claim is barred by the statute of
6 limitations; and (iv) plaintiff has failed to allege the elements of the claim.

7 **9. Ninth Claim for Relief: Fraud**

8 Plaintiff fails to state a claim for relief because: (i) the claim is preempted by HOLA;
9 (ii) fraud has not been pled with the required specificity; (iii) the claim is barred by the statute of
10 limitations; and (iv) plaintiff has failed to allege the elements of the claim.

11 **10. Tenth Claim for Relief: Fraud – Negligent Misrepresentation**

12 Plaintiff fails to state a claim for relief because: (i) the claim is preempted by HOLA;
13 (ii) fraud has not been pled with the required specificity; (iii) the claim is barred by the statute of
14 limitations; and (iv) plaintiff has failed to allege the elements of the claim.

15 **11. Eleventh Claim for Relief: Promissory Estoppel**

16 Plaintiff fails to state a claim for relief because: (i) the claim is preempted by HOLA;
17 and (ii) plaintiff has failed to allege the elements of promissory estoppel.

18 **12. Twelfth Claim for Relief: Negligence**

19 Plaintiff fails to state a claim for relief because: (i) Wells Fargo owed no duty to
20 plaintiff; (ii) the claim is preempted by HOLA; and (iii) plaintiff has failed to allege the elements
21 of negligence.

22 **13. Thirteenth Claim for Relief: Elder Abuse**

23 Plaintiff fails to state a claim for relief because: (i) the claim is barred by the statute of
24 limitations; (ii) the claim is preempted by HOLA; (iii) the claim is barred by the statute of
25 limitations; and (iv) plaintiff has failed to allege the elements of the claim.

26 **14. Fourteenth Claim for Relief: Wrongful Foreclosure**

27 Plaintiff fails to state a claim for relief because: (i) plaintiff has failed to allege the
28 elements of the claim.

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15. **Fifteenth Claim for Relief: Violation of Bus. & Prof. Code § 17200**

Plaintiff fails to state a claim for violation of Bus. & Prof. Code § 17200 ("UCL") because: (i) the claim is derivative of plaintiff's other, insufficient, claims; (ii) plaintiff has failed to plead the elements of an UCL claim; and (iii) the claim is preempted by HOLA.

16. **Sixteenth Claim: Cancellation of Instrument**

Plaintiff fails to state a claim for relief because: (i) plaintiff has not pled the elements of the claim.

Respectfully submitted,

Dated: March 28, 2013

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CAMPBELL & TRYTTEN LLP

By: /s/ Kenneth A. Franklin

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8	12 C.F.R. § 560.2	3, 4
9	12 C.F.R. § 560.2(a)	3, 5, 6
10	12 C.F.R. § 560.2(b)	3, 5, 6
11	12 C.F.R. § 560.2(b)(1)	4
12	12 C.F.R. § 560.2(b)(4)	4, 5, 6, 8
13	12 C.F.R. § 560.2(b)(5)	4
14	12 C.F.R. § 560.2(b)(9)	4, 5, 6
15	12 C.F.R. §§ 560.2(b)(10)	5, 6, 7, 8
16	CONSTITUTIONAL PROVISIONS	
17	U.S. Const. art. III	8
18	OTHER AUTHORITIES	
19	Cal. Civ. Code §§1918.5-1921.1920	6

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 This action arises from a secured loan made by Wells Fargo Bank, N.A.'s predecessor,
4 World Savings Bank, FSB ("World Savings") to plaintiff in 2007. **Plaintiff has not made a**
5 **payment on her loan for over a year.**¹ Plaintiff alleges that Wells Fargo does not own the note
6 and that it failed to modify her loan. As set forth below, plaintiff's note ownership claims are
7 meritless and Wells Fargo had no duty to modify her loan.

8 **2. SUMMARY OF PLAINTIFFS' COMPLAINT AND**
9 **JUDICIALLY NOTICEABLE FACTS**

10 On or about March 15, 2007, plaintiff borrowed \$475,000 (the "Loan") from World
11 Savings. (A copy of the deed of trust is attached to the Request for Judicial Notice ("RJN") as
12 Exh. A; FAC, Exh. A.)² The Loan was memorialized by a promissory note and secured by a
13 deed of trust recorded against located at 3 Summit Street, San Francisco, California. (the
14 "Property").

15 On December 31, 2007, World Savings changed its name to Wachovia Mortgage, FSB.
16 It underwent a second name change to Wells Fargo Bank Southwest, N.A. before merging with
17 Wells Fargo Bank, N.A. ("Wells Fargo") in November, 2009. (RJN, Exhs. B, C, D and E are
18 certificates issued by the Office of Thrift Supervision and Office of the Comptroller of the
19 Currency that acknowledge the federal savings bank charter, authorize the name changes, and
20 approve the merger; RJN, Exh. F is a printout from the FDIC website showing the history of
21 World Savings.)

22 There is no dispute that plaintiff defaulted on the Loan by failing to make the April 2012
23 payment and all subsequent payments. (Motion, 12:4; RJN, Exh. G.) The default resulted in the
24 following notices being recorded with the San Francisco County Recorder:

25
26 ¹ Plaintiff admits that she stopped making payments in April 2012. (Plaintiff's motion for a
27 preliminary injunction (the "Motion"), Document no. 13, 12:4.)

28 ² Plaintiff is confused about the date of her loan from World Savings. In the FAC, plaintiff
references a 2003 deed of trust, however the deed of trust attached to the FAC is dated 2007.
(FAC ¶ 8 and Exh. A.)

- A notice of default recorded on October 22, 2012. (RJN, Exh. G);
- A substitution of trustee recorded on December 14, 2012. (RJN, Exh. H); and
- A notice of trustee's sale was recorded on January 23, 2013 setting the trustee's sale for February 13, 2013. (RJN Exh. I).

Plaintiff's claims are as follows:

- Plaintiff alleges that the Loan was loan was predatory. (FAC ¶¶ 9-11 and 26);
- Plaintiff alleges that the Loan was improperly securitized. (FAC ¶¶ 35-36); and
- Plaintiff alleges that Wells Fargo did not properly handle her loan modification request. (FAC ¶¶ 107-108.)

3. THE COMPLAINT FAILS TO MEET THE RULE 8 PLEADING REQUIREMENTS

Plaintiff's claims allegedly relate to a 2003 loan in the amount of \$405,000. (FAC ¶¶ 8,11 and 150.) Nevertheless, plaintiff attaches to the FAC a deed of trust for a 2007 loan in the amount of \$475,000. (FAC Exh. A.) In the Motion, plaintiff references a 2004 loan. (Motion 2:2-6.) Since the entire FAC relates to a mortgage loan and it is not clear what loan is at issue in the FAC, the FAC must be dismissed. (F.R.C.P. Rule 8.) The FAC lacks the certainty necessary for a meaningful response.

4. THE MAJORITY OF PLAINTIFF'S CLAIMS ARE PREEMPTED BY THE HOME OWNERS LOAN ACT (HOLA)

At loan origination, World Savings was a federal savings bank regulated by the Office of Thrift Supervision ("OTS"). (RJN, Exs. B-F.) On December 31, 2007, World Savings changed its name to Wachovia Mortgage, FSB, but remained chartered under HOLA and overseen by the OTS. *Id.* Wachovia Mortgage, FSB merged with Wells Fargo Bank, N.A. effective November 1, 2009. *Id.*³

³ HOLA applies even though World Savings is no longer chartered as a federal savings bank. *See, DeLeon v. Wells Fargo Bank, N.A.*, 729 F. Supp. 2d 1119, 1126 (N.D. Cal. 2010) ("Wells Fargo notes that at the time the loan was made to the DeLeons [plaintiff], 'World Savings Bank, FSB was a federally chartered savings bank organized and operating under HOLA' and observes correctly that the same preemption analysis would apply to any alleged misconduct after November 1, 2009, when the lender merged into a national savings banking association.) HOLA, 12 U.S.C. § 1461 *et seq.*, governs the operations of a "federal savings association," which by definition include federally chartered savings banks. 12 C.F.R. § 541.11. World

1 “Through HOLA, Congress gave the Office of Thrift Supervision (‘OTS’) broad
2 authority to issue regulations governing thrifts. . . . As the principal regulator for federal savings
3 associations, OTS promulgated a preemption regulation in 12 C.F.R. § 560.2.” *Silvas v. E*Trade*
4 *Mortg. Corp.*, 514 F.3d 1001, 1005 (9th Cir. 2008). Section 560.2 reads, inter alia:

5 OTS hereby occupies the entire field of lending regulation for federal
6 savings associations. OTS intends to give federal savings associations
7 maximum flexibility to exercise their lending powers in accordance with a
8 uniform federal scheme of regulation.

9 12 C.F.R. § 560.2(a). Section 560.2(b) lists specific types of state laws
10 that are preempted. The list includes state laws that purport to impose
11 requirements regarding:

12 (4) The terms of credit, including amortization of loans and the
13 deferral and capitalization of interest and adjustments to the interest rate,
14 balance, payments due, or term to maturity of the loan, including the
15 circumstances under which a loan may be called due and payable upon the
16 passage of time or a specified event external to the loan...

17 (5) Loan-related fees, including without limitation, initial charges, late
18 charges, prepayment penalties, servicing fees...

19 (9) Disclosure and advertising, including laws requiring specific
20 statements, information, or other content to be included in credit
21 application forms, credit solicitations, billing statements, credit contracts,
22 or other credit-related documents...

23 (10) Processing, origination, servicing, sale or purchase of, or
24 investment or participation in, mortgages...

25 12 C.F.R. § 560.2(b).

26 In *Silvas*, the Ninth Circuit set forth the analysis to follow to determine whether a state
27 law is preempted. First, a court should determine whether, as applied, the law is the type of law
28 listed in Section 560.2(b). If it is, the analysis ends, and the law is preempted. *See, Silvas*, 514
F. 3d at 1005 (quoting OTS Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996)). If the
law in question, as applied, is not listed in Section 560.2(b), a court should determine whether
the law affects lending. If the answer is yes, then, pursuant to Section 560.2(a), a presumption
arises that the law is preempted. *Id.*; *see, Omega v. Wells Fargo & Co.*, 2011 U.S. Dist. LEXIS
103928, at *13 (N.D. Cal. Sept. 14, 2011).

Savings’ lending operations were therefore governed by HOLA in 2007, when it made the loan
to plaintiffs.

Here, plaintiff's state law claims are preempted by HOLA. Although variously labeled, all of plaintiff's claims are based on the terms of credit, the disclosures made to plaintiff, and the processing, origination sale or servicing of plaintiff's loan. Any such claims, no matter what they are called, attempt to use state law to impose requirements on the lending activities of a federal savings association. Such claims fall within 12 C.F.R. § 560.2(b)(4), (5), (9) or (10) and are, therefore, preempted. What follows is a list of the type of allegations in the FAC that are preempted by HOLA:

A. Note Ownership Claims (First and Fifth Claims)

Throughout the FAC plaintiff makes "note ownership" claims that are preempted by HOLA. *Winding v. Cal-Western Reconveyance Corp.*, 2011 U.S. Dist. LEXIS 8962, *33-34 (E.D. Cal. Jan. 21, 2011) the Court confirmed that claims relating to ownership of the note are preempted by HOLA. ("Wells Fargo characterizes the "heart" of the complaint's claims as "negotiable instrument" transfer and ownership and that allegations to such effect fall within section 560.2(b)(1) as challenge to a "sale or purchase of" a "mortgage" originated by a savings bank. Wells Fargo is correct that section 560.2 preempts the complaint's allegations as to misconduct surrounding foreclosure originating from negotiable instrument issues. HOLA preemption further warrants dismissal of the complaint's claims given that they address "sale or purchase of . . . or participation in, mortgages.") in *Ahmed v. Wells Fargo Bank*, 2011 U.S. Dist. LEXIS 49526 (N.D. Cal. May 9, 2011) the Court dismissed *with prejudice* claims based on allegations that Wells Fargo "did not possess the promissory note" or "are not the legal owners of the note and Trust Deed" because such claims are preempted by HOLA. *Id.* at *8-*9; *Becker v. Wells Fargo Bank, N.A.*, (E.D. Cal. March 11, 2011) U.S. Dist. LEXIS 29687 at *56-58 (HOLA preempted claims based on allegations that defendants were not the "true holder" of the note); *Hunt v. Wells Fargo Bank, N.A.*, (E.D. Cal. March 21, 2011) U.S. Dist. LEXIS 29110 at *2-3;⁴ (HOLA preempted quiet title and slander claims rooted in allegations that Wells Fargo was "not entitled to ownership of the loan").

⁴ After the District Court granted Wells Fargo's motion to dismiss and dismissed the case with prejudice, plaintiffs filed a notice of appeal.

1 **B. Origination Claims (Eighth, Tenth, Thirteenth, and Fifteenth Claims)**

2 Plaintiff's claims regarding the Loan origination and the terms of the Loan fail. Recent
3 federal case law has concluded that loan origination claims are "universally" preempted. In
4 *Bassett v. Ruggles*, 2009 U.S. Dist. LEXIS 83349 (E.D. Cal. September 14, 2009), the District
5 Court, after surveying the landscape of HOLA preemption case law, concluded that the cases
6 "universally indicate Plaintiffs' claims based on fraud or conspiracy to breach fiduciary duties
7 against Flagstar based on the allegation that Ruggles/IGS induced Plaintiffs to enter into a loan
8 with an interest rate higher than Plaintiffs were qualified for will be preempted by HOLA." *Id.*
9 at *60. The *Bassett* court also dismissed, without leave to amend, plaintiff's claim "based on the
10 alleged nondisclosure of the yield spread premium or the payment of the yield spread premium."
11 *Id.*

12 In *Andrade v. Wachovia Mortgage, FSB*, 2009 U.S. Dist. LEXIS 34872 *6-*9 (S.D. Cal.
13 April 21, 2009), plaintiff asserted various state law claims including quiet title, fraud, and
14 rescission. The Court ruled that such claims were expressly preempted by 12 C.F.R. § 560.2(b),
15 reasoning that: "Plaintiff's allegations revolve entirely around the 'processing, origination, [and]
16 servicing' of the Plaintiff's mortgage, including the 'terms of credit' offered, the 'loan-related
17 fees' charged, and the adequacy of disclosures made by Defendants in soliciting and settling the
18 loan. 12 C.F.R. §§ 560.2(b)(4), (9), (10). Because the state laws on which Plaintiff relies, as
19 applied, would regulate lending activities expressly contemplated by § 560.2(b), the claims are
20 preempted." *Id.* at *9. See also, *Amaral v. Wachovia Mortgage*, 692 F. Supp. 2d 1226, 1238
21 (E.D. Cal. 2010) ("Because Plaintiffs' fraud claim, as applied, bears on lending activities
22 expressly contemplated by § 560.2(b), it is preempted.").

23 In *Nava v. Virtual Bank, et al.*, 2008 U.S. Dist. LEXIS 72819 *14-*23 (E.D. Cal 2008),
24 the plaintiff sued for TILA violations, fraudulent omission, breach of contract, breach of implied
25 covenant, and violation of the UCL predicated on unfair or fraudulent business practices,
26 violations of TILA and violations of Financial Code §22302. The court dismissed all three of the
27 UCL claims finding that they were preempted by HOLA. *Id.* at *14-*23. With respect to the
28 *Nava* UCL claim based on TILA violations, plaintiff's claim was primarily based on "a failure to

properly disclose and represent the true interest rate of the loan and that negative amortization was certain to occur, as required by TILA.” *Id.* at *19. The court found that this claim “implicates § 560.2(b)(9) since its application would purport to impose requirements on the types of disclosures made by defendants”, and was preempted by HOLA. *Id.* at *19-*20. The court further held that “plaintiff’s UCL claim based on violation of TILA is also preempted by federal law since its application would supplement TILA by changing TILA’s framework.” *Id.* at *20.

In *Garcia v. Wachovia Mortg. Corp.*, 676 F. Supp. 2d 895, 913 (C.D. Cal. October 14, 2009), the plaintiff brought a state unfair competition claim, predicated *inter alia* on the loan’s negative amortization features and the lender’s failure to provide an adjustable rate disclosure notice. The court held: “Here, as argued by Defendant, the claims relating to the loan’s negative amortization features and teaser rates, and failure to provide adjustable rate mortgage disclosure notice, brought pursuant to California Civil Code §1916.7 and/or ‘1916.7 10 (c)’ are preempted by 12 C.F.R. §560.2(b)(4) and (b)(9). The claim pursuant to California Civil Code §1916.10 for improper failure to downwardly adjust a mortgage is rate is preempted by 12 C.F.R. §560.2(b)(4) as well. The claims relating to notification of changes in interest rate brought pursuant to California Civil Code ‘§1918.5-1921.1920’ are preempted by 12 C.F.R. §560.2(b)(4) as well. To the extent Plaintiff makes claims relating to inability to qualify for the loan she was given, these are preempted by 12 C.F.R. §560.2(b)(10). The court can identify no state law claims alleged within the UCL claim that are not preempted by some portion of 12 C.F.R. §560.2(b).” *Id.*

C. Wrongful Foreclosure Claims (Fifteenth Claim)

In support of her fifteenth claim for relief, plaintiff alleges that Wells Fargo violated Civil Code § 2923.5. Any alleged violation of § 2923.5 is preempted under 12 C.F.R. § 560.2(b)(10) [Processing... [and] servicing... of... mortgages].

District Courts have, with few exceptions, found Civil Code § 2923.5 to be preempted as purporting to regulate a lender’s processing or serving activities, both before and after *Mabry v. Superior Court*, 185 Cal. App. 4th 208 (2010). One of the numerous pre-Mabry decisions was *Murillo v. Aurora Loan Servs., LLC*, 2009 U.S. Dist. LEXIS 61791 (N.D. Cal. July 17, 2009), where the court dismissed a § 2923.5 claim, with prejudice, that alleged “Defendants failed to

1 properly file a declaration with their notice of default.” The district court held that “[a]s applied,
2 Plaintiffs’ § 2923.5 claim concerns the processing and servicing of Plaintiffs’ mortgage. As
3 such, the Court finds that Plaintiffs’ § 2923.5 claim is preempted under HOLA.” *Murillo*, 2009
4 U.S. Dist. LEXIS 61791, at *11.

5 Several District Courts have recently relied on *Murillo*. In *Odinma v. Aurora Loan*
6 *Servs.*, 2010 U.S. Dist. LEXIS 28347 (N.D. Cal. Mar. 23, 2010), the plaintiffs alleged that their
7 lender violated Civil Code § 2923.5 by failing to provide proper notices before initiating the
8 foreclosure process. The court held that a § 2923.5 claim “concerns the processing and servicing
9 of Plaintiff’s mortgage and is therefore preempted by HOLA.” *Odinma*, 2010 U.S. Dist. LEXIS
10 28347, at *23.

11 In *Phat Ngoc Nguyen v. Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022 (N.D. Cal. 2010),
12 the court relied in part on *Murillo* to find Section 2923.5 to be preempted even after *Mabry*. *Id.*
13 at 1032-33 (listing the federal district court decisions concluding that Section 2923.5 is
14 preempted because the state law deals with contacting the borrower and requires a specific
15 declaration in the Notice of Default such that it falls squarely within the scope of HOLA’s
16 Section 560.2(b)(10)).

17 The Court in *Giordano v. Wachovia Mortg., FSB*, 2010 WL 5148428, at *13 (N.D. Cal.
18 Dec. 14, 2010), held that claims based on, inter alia, Wachovia’s alleged violation of Civil Code
19 § 2923.5 were preempted under HOLA, noting that “even assuming the limited construction of
20 § 2923.5 proffered by *Mabry*, a state statute that imposes additional disclosure and
21 communications obligations upon a lender prior to commencement of foreclosure proceedings is
22 not ‘incidental’ to lending....” *See also, Taguinod v. World Savings Bank*, 2010 U.S. Dist.
23 LEXIS 127677, at **19-20 (C.D. Cal. 2010) (holding 2923.5 to be preempted by HOLA despite
24 *Mabry*). More recent decisions in the Central District are to the same effect. *See, Javaheri v JP*
25 *Morgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 114510 (C.D. July 2012); *McNeeley v. Wells*
26 *Fargo Bank N.A.*, 2011 U.S. Dist. LEXIS 145322 *8 (C.D. December 2011); *De Ferguson v.*
27 *Wachovia Mortgage, FSB*, 2012 U.S. Dist. LEXIS 79501 (C.D. Cal. Jun. 4, 2012)
28 (overwhelming weight of authority has held that a Section 2923.5 claim is preempted by HOLA).

D. Loan Modification Claims (Third, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, and Fifteenth Claims)

Finally, plaintiff's allegations regarding her loan modification application are likewise preempted by HOLA. (FAC ¶¶ 26-34 and 83-86.) These claims are preempted by 12 C.F.R. § 560.2(b) (4) terms of credit and (10) ["Processing, origination [and] sale...of... mortgages"]. *Biggins v. Wells Fargo & Co.*, 266 F.R.D. 399, 417 (N.D. Cal. 2009) (finding (b)(10) preempts state claim promises directed toward a duty to make a loan modification); *DeLeon v. Wells Fargo Bank, N.A.*, 729 F. Supp. 2d 1119, 1126-1128 (N.D. Cal. 2010) (plaintiffs' claim that the lender proceeded to sale without concluding modification discussions were preempted relating to the "processing" and "servicing" of the subject mortgage); *Sato v. Wachovia Mortg., FSB*, 2011 U.S. Dist. LEXIS 75418, at *20 (N.D. Cal. Jul 13, 2011) (dismissing claim alleging that lender failed to modify her loan, as it "clearly falls under the preemption provisions for 'processing, origination, sale or purchase of ... mortgages' and 'terms of credit.'"); *Zarif v. Wells Fargo Bank, N.A.* 2011 U.S. Dist. Lexis 29867, at **8-9 (S.D. Cal 2011). ("each of Plaintiffs' claims specifically challenge the processing of Plaintiffs' loan modification application and servicing of Plaintiffs' mortgage, and fall within the specific types of preempted state laws listed in § 560.2(b)(4) & (10)... For this reason alone, the complaint is dismissed...").

5. PLAINTIFF'S DECLARATORY RELIEF CLAIM FAILS (FIRST CLAIM)

A. Declaratory Relief Is Not Necessary Or Appropriate

The Declaratory Judgment Act (DJA) permits a federal court to "declare the rights and other legal relations" of parties to a case of actual controversy. 28 U.S.C. § 2201; *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 893 (9th Cir. 1986). The "actual controversy" requirement of the DJA is the same as the "case or controversy" requirement of Article III of the United States Constitution. *American States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1993). Under the DJA, a two-part test is necessary to determine whether a declaratory judgment is appropriate. *Principal Life Insurance Co. v. Robinson*, 394 F. 3d 665, 669 (9th Cir. 2005). First, the court must determine if there exists an actual case or controversy within the court's jurisdiction. *Id.* Second, if so, the court must decide whether to exercise its jurisdiction. *Id.*

There is no actual controversy involving the parties rights, since all of plaintiff's claims are for accrued wrongs. There are no allegation separate and apart for the other claims for relief and therefore, there is no need for the Court to exercise jurisdiction. Moreover, this claim fails for the same reasons her other claims fails, as set forth below.

B. Plaintiff's Note Ownership Claim Fails

i. The Judicially Noticeable Documents Establish That Wells Fargo Has Standing to Foreclose On The Deed of Trust

The original lender, World Savings, simply changed its name to Wachovia Mortgage, FSB and later merged into Wells Fargo Bank, N.A. (RJN, Exhs. B-F.) As set forth below, judicially noticeable documents conclusively establish that Wells Fargo has standing to foreclose:

- Plaintiff borrowed \$475,000.00 from World Savings, and executed a deed of trust pledging the Property to World Savings as security for the loan. The deed of trust identifies World Savings as the lender and beneficiary. (Motion 2:2-6; FAC, Exh. A; RJN, Exh. A.)
- World Savings changed its name to Wachovia Mortgage, FSB, Wachovia Mortgage, FSB was converted to Wells Fargo Bank Southwest, N.A. and then was merged into Wells Fargo Bank, N.A. (RJN, Exhs. B-F.)

The above referenced documents show that the lender simply changed its name and was merged into Wells Fargo Bank, N.A. There was no assignment. As set forth above, Wells Fargo is the successor to World Savings. (RJN, Exhs. B-F.)

In addressing a similar clam involving virtually identical documentation the Court in *Hague v. Wells Fargo Bank, N.A.*, No. C11-02366, 2011 U.S. Dist. LEXIS 84695, at *8–11 (N.D. Cal. Aug. 2, 2011) ruled:

The *Hagues'* legal arguments are unpersuasive. They contend that Wells must establish that it is the "real party in interest" in order to exercise the power of sale. . . . The deed of trust at issue here lists World Savings as the lender. Judicially noticeable documents show that World Savings and Wells Fargo are one and the same. Thus Wells Fargo's rights as lender under the deed of trust and under California's nonjudicial foreclosure statutes are controlling. The Court agrees with Wells Fargo that the *Hagues'* allegations regarding Wells

Fargo's ownership interest in the loan are insufficient to support a claim for declaratory relief. . . . Wells Fargo's motion to dismiss this claim is GRANTED.

As was the case in *Hague*, Wells Fargo is entitled to foreclose on a loan made by its predecessor World Savings.

ii. Wells Fargo Need Not Establish Its Ownership Of The Note

Wells Fargo need not establish its ownership of the note: "Under California law, an 'allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure proceeding invalid.'" *Quintos v. Decision One Mortgage Co., LLC*, 2008 U.S. Dist. LEXIS 104503, at *7 (S.D. Cal. 2008) (Court rejected a similar contention that defendants lacked standing to foreclose.); *Alford v. Wachovia Bank/World Savings Bank*, 2010 U.S. Dist. LEXIS 14060, at **36-37 (an "allegation that the trustee did not have the original note or had not received it is insufficient to render the foreclosure proceeding invalid.") (Citing *Neal v. Juarez*, 2007 U.S. Dist. LEXIS 98068, 2007 WL 2140640, at *8 (S.D. Cal. 2007)); *Gomes v. Countrywide*, 192 Cal. App. 4th 1149, 1154 (2011) (Court rejected claims similar to those made by plaintiff and held that a foreclosing lender was not required to prove ownership of the note); *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039, 1043 (N.D. Cal. 2009). ("[p]roduction of the original note is not required to proceed with a non-judicial foreclosure.")

6. THE INJUNCTIVE RELIEF CLAIM FAILS (SECOND CLAIM)

Injunctive relief is a remedy, not a cause of action. *County of Del Norte v. City of Crescent City*, 71 Cal. App. 4th 965, 973 (1999); *Pazargad v. Wells Fargo Bank, N.A.* 2011 U.S. Dist. LEXIS 94850, at *6-*7 (C.D. Cal. Aug. 23, 2011) ("[i]njunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted."); *Santos v. Countrywide Home Loans*, 2009 U.S. Dist. LEXIS 103453, at *13 (E.D. Cal. Nov. 6, 2009) ("Declaratory and injunctive relief are not independent claims, rather they are forms of relief.").

1 **7. PLAINTIFF'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL**
2 **DISTRESS FAILS (THIRD CLAIM)**

3 The elements of intentional infliction of emotional distress are: "(1) outrageous conduct
4 by defendant, (2) intention to cause or reckless disregard or the probability of causing emotional
5 distress, (3) severe emotional suffering, and (4) actual and proximate causation of the emotional
6 distress." *Bogard v. Employers Casualty Co.*, 164 Cal. App. 3d 602, 616 (1985). Plaintiff must
7 allege conduct "so extreme as to exceed all bounds of that usually tolerated in a civil
8 community." *Yu v. Signet Bank*, 69 Cal. App. 4th 1377, 1397 (1999). Put another way, plaintiff
9 must allege conduct "that has been so outrageous in character, and so extreme in degree, as to go
10 beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in
11 a civilized community." *Cochran v. Cochran*, 65 Cal. App. 4th 488, 494 (1998). It is for the
12 Court in the first instance to determine whether the plaintiff has alleged conduct which the trier
13 of fact may find to be extreme and outrageous. *Tollefson v. Roman Catholic Bishop*, 219 Cal.
14 App. 3d 843, 858 (1990).

15 The FAC falls far short of alleging "outrageous" conduct by Wells Fargo. Plaintiff's
16 claim is essentially that Wells Fargo did not properly evaluate her for a loan modification and
17 required that she resubmit documents. (FAC ¶ 48.) This claim is not "outrageous" "atrocious"
18 and "utterly intolerable in a civilized community." Instead, plaintiff was very unhappy with the
19 service she received from Wells Fargo. Displeasure with the performance of a contracting party
20 does raise to the tort of intentional infliction of emotional distress. Moreover, this claim is
21 nothing more than a claim relating to the serving of the loan and therefore preempted by HOLA.
22 (See Section, 4D above.)

23 **8. THE NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM FAILS**
24 **(FOURTH CLAIM)**

25 As set forth by the Court in *Lau v. Pylman*, 2011 U.S. Dist. LEXIS 35786, 19-20 (E.D.
26 Cal. Mar. 18, 2011):

27 California does not recognize an independent cause of action for the
28 negligent infliction of emotional distress. The California Supreme Court
 "[has] repeatedly recognized that the negligent causing of emotional
 distress is not an independent tort, but the tort of negligence." *Burgess v.*

1 *Superior Court*, 2 Cal. 4th 1064, 1072, 9 Cal. Rptr. 2d 615, 831 P.2d 1197
 2 (1992) (internal citations and quotations omitted) (emphasis [*20] in
 3 original). *See also, Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965,
 4 25 Cal. Rptr. 2d 550, 863 P.2d 795, (1993) (“[T]here is no independent
 5 tort of negligent infliction of emotional distress.”); *Cramer v.*
 6 *Consolidated Freightways, Inc.*, 209 F.3d 1122, 1133 (9th Cir. 2000)
 7 (“The tort of negligent infliction of emotional distress is simply a
 8 negligence claim alleging that the defendant breached a duty to protect the
 9 plaintiff’s mental well-being.”) “The elements of a cause of action for
 10 negligence are well established. They are (a) a legal duty to use due care;
 11 (b) a breach of such legal duty; [and] (c) the breach is the proximate or
 12 legal cause of the resulting injury.” *Ladd v. County of San Mateo*, 12 Cal.
 13 4th 913, 917, 50 Cal. Rptr. 2d 309, 911 P.2d 496 (1996) (internal citations,
 14 quotations, and emphasis omitted). *See also, Truong v. Nguyen*, 156 Cal.
 15 App. 4th 865, 875, 67 Cal. Rptr. 3d 675 (2007); *Corales*, 567 F.3d at 572.

16 As set forth by the Court in *Taguinod v. World Sav. Bank, FSB*, 755 F. Supp. 2d 1064,
 17 1074 (C.D. Cal. 2010): “California law does not generally recognize a cause of action for
 18 emotional distress stemming solely from a financial loss. *See, Butler-Rupp v. Lourdeaux*, 134
 19 Cal. App. 4th 1220, 1228, 36 Cal. Rptr. 3d 685 (2005) (“[I]n the absence of physical injury, the
 20 courts have never allowed recovery of damages for emotional distress arising solely from
 21 property damage or economic injury to the plaintiff.”). The Motion is therefore GRANTED as to
 22 this claim.”

23 Moreover, to assert a claim for negligence, a plaintiff must allege that the defendant owed
 24 a duty to the plaintiff that subsequently was breached, and such breach was the proximate cause
 25 of the plaintiff’s injury. *See, Ditto v. McCurdy*, 510 F. 3d 1070, 1078 (9th Cir. 2007). Wells
 26 Fargo did not owe plaintiff a duty of care. *See, Section 13 below.* And, as set forth above, this
 27 claim is nothing more than a claim relating to the serving of the loan and therefore preempted by
 28 HOLA. (*See Section, 4D above.*)

29 **9. PLAINTIFF FAILS TO STATE A CLAIM FOR QUIET TITLE**

30 **(FIFTH CLAIM)**

31 Plaintiff’s quiet title claim is simply a note ownership claims. Plaintiff’s claim is based
 32 upon the misplaced assertion that “there must be a clear and unbroken chain of title for both the
 33 Deed of Trust and the Promissory Note” and that Wells Fargo needs to prove assignment of the
 34 promissory note. (FAC ¶ 62.) For the reasons set forth in Section 5B above, this claim fails.

35 Furthermore, plaintiff’s failure to tender the loan proceeds is fatal to her claim for quiet

1 title. The tender rule applies to a quiet title action because the claim is implicitly integrated to
 2 the foreclosure sale. Civ. Proc. Code § 761.020; *Kozhayev v. America's Wholesale Lender*, 2010
 3 U.S. Dist. LEXIS 77553, 2010 WL 3036001, at *5 (E.D. Cal. Aug. 2, 2010). Numerous
 4 California courts have recognized that claims to prevent or undo a foreclosure “generally cannot
 5 go forward unless the plaintiff has at least alleged a credible offer to tender the indebtedness.”
 6 *Collins v. Power Default Services, Inc.*, 2010 U.S. Dist. LEXIS 3361, at **4-6 (N.D. Cal. Jan 24,
 7 2010); *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477-79 (1974) (The borrower “cannot quiet title
 8 without discharging his debt. The cloud upon his title persists until the debt is paid.”) Indeed, a
 9 complaint that does not allege such a tender does not state a cause of action. *McElroy v. Chase*
 10 *Manhattan Mortg. Corp.*, 134 Cal. App. 4th 388 (2005).

11 **10. THE COVENANT OF GOOD FAITH CLAIM FAILS (SIXTH CLAIM)**

12 The elements of a claim for breach of the covenant of good faith and fair dealing are:
 13 (1) the existence of a contract; (2) the plaintiff did all, or substantially all, of the significant
 14 things the contract required; (3) the conditions required for the defendant's performance had
 15 occurred; (4) the defendant unfairly interfered with the plaintiff's right to receive the benefits of
 16 the contract; and (5) the plaintiff was harmed by the defendant's conduct. *Trinity Hotel Inv.,*
 17 *LLC v. Sunstone OP Props., LLC*, 2009 U.S. Dist. LEXIS 13692 (C.D. Cal. Feb. 5, 2009);
 18 *Carma Developers, Inc. v. Marathon Development Calif., Inc.*, 2 Cal. 4th 342, 371-375 (Cal.
 19 1992); *Racine & Laramie, Ltd. v. Dept. of Parks & Rec.*, 11 Cal. App. 4th 1026, 1031-32 (1992).

20 Plaintiff's claim is fatally flawed because she does not and cannot allege that she
 21 complied with the terms of the contract, i.e. that she made the loan payments. Even if plaintiff
 22 had not defaulted on the contract, her claim is flawed. Plaintiff alleges that Wells Fargo failed to
 23 work with her to modify her loan and avoid foreclosure. (FAC ¶ 68.) This claim is inadequate.
 24 Plaintiff had no right to a loan modification. The expressed contract, the note and deed of trust,
 25 required that plaintiff make her loan payment. There are no provisions for a loan modification,
 26 instead, there are provision that expressly allow foreclosure. “An implied covenant of good faith
 27 and fair dealing cannot contradict the express terms of a contract.” *Reyes v. Wells Fargo Bank,*
 28 *N.A.*, 2011 U.S. Dist. LEXIS 2235 at * 34 (N.D. Cal. Jan. 3, 2011) (citing California cases). See

1 also, *Spinks v. Equity Residential Briarwood Apartments*, 171 Cal. App. 4th 1004, 1033-1034
 2 (2009) ("The implied covenant of good faith and fair dealing is limited to assuring compliance
 3 with the express terms of the contract . . .").

4 To the extent that plaintiff is asserting that Wells Fargo was not entitled to enforce the
 5 expressed terms of the deed of trust, that claim fails. *Guz v. Bechtel National, Inc.*, 24 Cal. 4th
 6 317 (2000) ("The covenant thus cannot be endowed with an existence independent of its
 7 contractual underpinnings. . . . It cannot impose substantive duties or limits on the contracting
 8 parties beyond those incorporated in the specific terms of their agreement."); *Vikco Ins. Services,*
 9 *Inc. v. Ohio Indemnity Co.*, 70 Cal. App. 4th 55, 70 (1999) ("Implied covenants are disfavored at
 10 law. . . . The courts will not imply a better agreement for parties than they themselves have been
 11 satisfied to enter into, or rewrite contracts whenever they operate harshly.")

12 **11. PLAINTIFF'S CLAIMS FOR FRAUD FAIL (SEVENTH, EIGHT, NINTH AND**
 13 **TENTH CLAIMS)**

14 **A. Fraud Claims**

15 The elements of fraud are: (i) a false representation as to material fact, (ii) knowledge of
 16 its falsity, (iii) intent to defraud, (iv) actual and justifiable reliance, and (v) resulting damage.
 17 *Wilhelm v. Pray, Price, Williams & Russell*, 186 Cal. App. 3d 1324, 1331 (1986). Under Rule
 18 9(b) fraud allegations must be specifically pled. *Glen Holly Entertainment, Inc. v. Tektronix,*
 19 *Inc.*, 100 F. Supp. 2d 1086, 1093-1094 (C.D. Cal. 1999) (reciting California elements).

20 The purpose of Rule 9(b) is to ensure that "allegations of fraud are specific enough to
 21 give defendants notice of the particular misconduct which is alleged to constitute the fraud
 22 charged so that they can defend against the charge and not just deny that they have done
 23 anything wrong. *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). "The complaint must
 24 specify such facts as the times, dates, places, benefits received, and other details of the alleged
 25 fraudulent activity." *Id.* at 671-72. Merely identifying allegedly fraudulent conduct fails. A
 26 plaintiff "must set forth what is false or misleading about a statement, and why it is false." *In re*
 27 *GlenFed Securities Litig.*, 42 F.3d 1541 at 1547 (9th Cir. 1994).

28 As for corporate defendants, Rule 9(b) requires plaintiffs to specifically plead: (1) the

misrepresentation, (2) the speaker and his or her authority to speak (3) when and where the statements were made, (4) whether the statements were oral or written, (5) if the statements were written, the specific documents containing the representations, and (6) the manner in which the representations were allegedly false or misleading. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 549 (9th Cir. 1989). Vague or conclusory allegations are insufficient to satisfy Rule 9(b)'s "particularity" requirement. *See, Moore*, 885 F. 2d at 540; *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

Plaintiff has utterly failed to meet the pleading requirements for fraud. Plaintiff merely claims that "Defendant promised Plaintiff" (FAC ¶ 71.) There are no allegations as to (1) the speaker and his or her authority to speak, (2) when and where the statements were made, or (3) whether the statements were oral or written. Further, there are no factual allegation, as opposed to conclusion of law as to "knowledge of its falsity, (iii) intent to defraud, (iv) actual and justifiable reliance, and (v) resulting damage."

Moreover, plaintiff's claim for fraud is nothing more than improper formulaic recitation of elements of fraud and therefore fails to meet the Rule 8 standards. As stated in *Ashcroft v. Iqbal*, 129 U.S. 1937, 1949 (2009):

[T]he pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully harmed-me accusation. [citation]. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of cause of action will not do." [citation]. Nor does a complaint suffice if it tenders "naked assertions" devoid of "further factual enhancement."

Plaintiff fraud claims falls well short of this standard. It contains no factual allegations and relies entirely on improper labels and legal conclusions, which are not entitled to the presumption of truth. *Iqbal* at 1949-50.

To the extent that plaintiff alleges that there was a failure to disclose information and a suppression of information, that claim also fails. (FAC ¶ 90.) Plaintiff fails to specifically state what facts were not disclosed or why Wells Fargo had a duty to disclosure any facts. Additionally, fraud based upon non-disclosure requires: (1) a fiduciary or confidential relationship; (2) nondisclosure; (3) intent to deceive; and (4) reliance and resulting injury, i.e.,

causation. Cal. Civ. Code § 1573; *Younan v. Equifax Inc.*, 111 Cal. App. 3d 498, 516 n. 14, 169 Cal. Rptr. 478 (1980); *Johannson v. Wachovia Mortg. FSB*, 2011 U.S. Dist. LEXIS 86692, 14-15 (N.D. Cal. Aug. 5, 2011). Here, there was no fiduciary or confidential relationship. “Absent special circumstances, a loan does not establish a fiduciary relationship between a commercial bank and its debtor.” *Das v. Bank of Am., N.A.*, 186 Cal. App. 4th 727, 741, 112 Cal. Rptr. 3d 439 (2010); *Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 476 (1989).

Moreover, plaintiff’s claim for fraud appears to be based upon the original loan. (FAC ¶ 82-83.) Since the loan was made in 2007, this claim is barred by the three year statute of limitation. C.C.P. § 338.

Since there are no allegations in the FAC that meet the pleading requirements for fraud, plaintiff’s claims fail.

B. The Negligent Misrepresentation Claim Fails

Under California law, negligent misrepresentation is a species of fraud. *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 173-174 (2003); *Cadlo v. Owens-Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004). For the reasons set forth above, plaintiff fails to plead facts meeting the standards of Rule 8 or Rule 9(b) and fails to plead facts that support fraud or negligent misrepresentation.

Moreover, negligent misrepresentation requires plaintiff to plead: (i) misrepresentation of a past or existing material fact; (ii) without a reasonable ground for believing it to be true; (iii) with intent to induce another’s reliance on the fact misrepresented; (iv) ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and (v) resulting damage. *Shamsian v. Atlantic Richfield Co.*, 107 Cal. App. 4th 967, 983 (2003).

There are no facts pled that meet the necessary elements for negligent misrepresentation.

Further, this claim appears to be based upon the original loan. (FAC ¶ 93-94.) Since the loan was made in 2007, this claim is barred by the two year statute of limitation. C.C.P. § 339.

Moreover, the threshold element for any negligence claim is the existence of a duty of care. *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 397 (1992). To assert a claim for negligence, a plaintiff must allege that the defendant owed a duty to the plaintiff that was breached. *Ditto v.*

1 *McCurdy*, 520 F. 3d 1070, 1078 (9th Cir. 2007). A plaintiff's "inability to plead a duty of care . .
 2 . precludes his maintenance of a cause of action on any negligence theory." *LiMandri v. Judkins*,
 3 52 Cal. App. 4th 326, 349 (1997); *Cicone v. URS Corp.*, 183 Cal. App. 3d 194, 207-211 (1986)
 4 (Duty of care necessary to proceed with a claim of negligent misrepresentation.) "[A]bsent a
 5 duty, the defendant's care, or lack of care, is irrelevant," *Software Design and Application Ltd.*
 6 *v. Hoeffer & Arnolt, Inc.*, 49 Cal. App. 4th 472, 481 (1996) "The determination of whether a duty
 7 exists is primarily a question of law." *Eddy v. Sharp*, 199 Cal. App. 3d 858, 864 (1988). As set
 8 forth in Section 13 below, lenders do not owe their borrowers a duty of care.

9 **12. PLAINTIFF'S ELEVENTH CLAIM FOR PROMISSORY ESTOPPEL FAILS**

10 As a preliminary matter, promissory estoppel is not really a separate claim for relief.
 11 Rather, it is an equitable device that serves as a substitute for consideration in certain cases.
 12 *Raedeke v. Gibraltar Sav. & Loan Ass'n*, 10 Cal. 3d 665, 672 (1974).

13 A claim based on promissory estoppel requires: "(1) a promise clear and unambiguous in
 14 its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be
 15 reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his
 16 reliance." *Laks v. Coast Fed. Sav. & Loan Ass'n*, 60 Cal. App. 3d 885, 890-891 (1976)
 17 (promissory estoppel claim failed because the alleged promise for an interim and permanent loan
 18 was conditional, the terms were not clear and unambiguous, and Plaintiff's reliance was not
 19 reasonable or foreseeable); *Guerrero v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 96261,
 20 at *12 (C.D. Cal. Sep. 14, 2010) ("Detrimental reliance is an essential feature of promissory
 21 estoppel"); *See, Aguilar v. Int'l Longshoremen's Union Local # 10*, 966 F.2d 443, 446 (9th Cir.
 22 1992) ("The fact that inferences might be drawn from these representations, however, does not
 23 transform them into an enforceable promise.")

24 Plaintiff cannot identify a "clear and unambiguous" promise. At most, plaintiff alleges
 25 that "Defendants' representatives promised . . . Plaintiff that Defendants' foreclosure department
 26 would hold off their foreclosure process to facilitate a loan modification and that Plaintiff need to
 27 withhold payments to be eligible for the loan modification." (FAC ¶ 100.) There was no
 28 enforceable promise.

1 To the extent that there was a “promise” to hold off on foreclosure, that “promise” was
 2 apparently honored. Plaintiff alleges that the “promise” was made in April 2012, plaintiff admits
 3 that no foreclosure occurred during the time that she submitted document in 2012. (FAC ¶¶ 16-
 4 18.)

5 The recent Central District opinion granting a motion to dismiss *Cabanillas v. Wachovia*
 6 *Mortg.*, Case No. SACV 12-00228-CJC (JPRx) (C.D. Cal. March 20, 2012; J. Carney) is directly
 7 on point in dismissing a claim for promissory estoppel. In *Cabanillas*, the claim for promissory
 8 estoppel was premised on the allegation that Wachovia “made numerous oral promises that they
 9 would give Plaintiffs a loan modification ... if Plaintiffs completed an application for a loan
 10 modification and provided certain documents... yet Wachovia still denied their loan
 11 modification request.” *Id.* at *3. However, the court held that the claim failed because:

12 The *Cabanillas* have failed to allege a clear or unambiguous promise
 13 related to their loan modification... Although these alleged
 14 representations by Wachovia imply something about the future, the
 15 representations are not clear, unambiguous, enforceable promises that
 16 support a promissory estoppel claim. By the *Cabanillas*’ own admission,
 Wachovia merely promised to consider and evaluate their loan
 modification request. That the *Cabanillas* did not receive a loan
 modification does not entitle them to pursue a claim of promissory
 estoppel. *Id.* at *4.

17 The allegations are made by plaintiff are similar to those rejected *Cabanillas*. As in
 18 *Cabanillas*, “That plaintiffs did not receive a loan modification does not entitle them to pursue a
 19 claim of promissory estoppel.” *Id.* at *4. Accordingly, the claim is defective and cannot support
 20 an injunction.

21 Further, there was no detrimental reliance. Plaintiff merely alleges that she “was induced
 22 to invest further funds to complete the project and not seek alternate means of curing any
 23 default.” (FAC ¶101.) This vague statement does not establish detrimental reliance. First, the
 24 claim that she “was induced to invest further funds to complete the project” makes no sense and
 25 is not supported by factual allegations. Second, plaintiff fails allege what “alternate means of
 26 curing” would have been pursued. Plaintiff’s allegation fails to meet the Rule 8 standard.

27 The case of *Nong v. Wells Fargo Bank, N.A., et al.*, 2010 U.S. Dist. LEXIS 136464, at
 28 *8-*10 (C.D. Cal. 2011), is instructive given its factual similarity. The plaintiff asserted that

1 Wachovia should be estopped from foreclosing her property because it told her that she met the
 2 qualifications for a HAMP modification. The court rejected this reasoning because “lenders are
 3 not required to make loan modifications for borrowers that qualify under HAMP nor does the
 4 servicer’s agreement confer an enforceable right on the borrower.” *Id.* at *10 (citing *Hoffman v.*
 5 *Bank of America, N.A.*, 2010 U.S. Dist. LEXIS 7045 (N.D. Cal. June 30, 2010)). According to
 6 the court in *Nong*, “reliance on a statement that she qualified for [a loan modification] would not
 7 be reasonable, for qualification ... does not entitle a borrower to a loan modification.” *Id.*
 8 Plaintiffs could not have a reasonable expectation that a loan modification would be offered. No
 9 modification was ever promised. And plaintiffs were not entitled to a loan modification, even if
 10 they qualified.

11 Moreover, plaintiff alleged that she relied on Wells Fargo’s statements by not **seeking**
 12 **alternate means** of curing the default. This claim is weaker than the claim rejected in *Nong*. In
 13 *Nong*, plaintiff alleged she relied on Wachovia’s statements by not pursuing other strategies to
 14 avoid foreclosure. *Id.* at *9. Again, the court rejected that reasoning in striking down her claim.
 15 “Where a plaintiff does not allege facts that could establish that [she] would have been
 16 successful in delaying the foreclosure sale, renegotiating her loan, and retaining possession of
 17 her home, dismissal is proper because the Complaint lacks a connection between her reliance on
 18 the alleged promise and losing her home to sustain her claim for estoppel.” *Id.* (citing *Newgent*
 19 *v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 18476, at *18 (S.D. Cal. Mar. 2, 2010)).

20 Finally, promissory estoppel requires plaintiff to demonstrate a change in position in
 21 response to what was promised. *Smith v. City & County of San Francisco*, 225 Cal. App. 3d 38,
 22 48 (1990). The action induced must be “of a definite and substantial character on the part of the
 23 promisee.” *Vlat v. University of So. California*, 5 Cal. App. 3d 935, 944 (1970). Plaintiff took
 24 no action, let alone definite and substantial action, as a result of the alleged promises. Plaintiff
 25 has not demonstrated any change in position and has not alleged action of a definite and
 26 substantial character.

27 **13. PLAINTIFF’S TWELFTH CLAIM FOR NEGLIGENCE FAILS**

28 “[A]bsent a duty, the defendant’s care, or lack of care, is irrelevant.” *Software Design*

1 *and Application Ltd. v. Hoeffer & Arnolt Inc.*, 49 Cal. App. 4th 472, 481 (1996). A plaintiff's
 2 "inability to plead a duty of care on the part of [defendant] precludes his maintenance of a cause
 3 of action on any negligence theory." *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 349 (1997).
 4 "The determination of whether a duty exists is primarily a question of law." *Eddy v. Sharp*, 199
 5 Cal. App. 3d 858, 864 (1988).

6 California law is clear: "as a general rule, a financial institution owes **no duty of care to a**
 7 **borrower** when the institution's involvement in the loan transaction does not exceed the scope of
 8 its conventional role as a mere lender of money." *Nymark v. Heart Fed. Savs. & Loan Ass'n*,
 9 231 Cal. App. 3d 1089 (1991) (emphasis added); *Resolution Trust Corp. v. BVS Dev.*, 42 F.3d
 10 1206, 1214 (9th Cir. 1994) ("Under California law, a lender does not owe a borrower or third
 11 party any duties beyond those expressed in the loan agreement, excepting those imposed due to
 12 special circumstance or a finding that a joint venture exists.").

13 In a recent case, a district court carefully reviewed California law governing the duties
 14 owed by a lender to a borrower concerning a loan modification. In *Dooms v. Fed. Home Loan*
 15 *Mortg. Corp.*, 2011 U.S. Dist. LEXIS 38550, at **24-25 (E.D. Cal. Mar. 30, 2011), the plaintiff-
 16 borrower had "experienced financial difficulties" and requested a loan modification. The
 17 *Dooms* court found that "[t]here is **no actionable duty between a lender and borrower** in that
 18 loan transactions are arms-length." *Id.* at *25 (emphasis added). "A lender 'owes no duty of
 19 care to the [borrowers] in approving their loan. Liability to a borrower for negligence arises
 20 only when the lender 'actively participates' in the financed enterprise 'beyond the domain of the
 21 usual money lender.'" *Id.* at **25-26 (citing *Wagner v. Benson*, 101 Cal. App. 3d 27, 35 (1980);
 22 *Nymark*, 231 Cal. App. 3d at 1096 ["as a general rule, a financial institution owes no duty of care
 23 to a borrower when the institution's involvement in the loan transaction does not exceed the
 24 scope of its conventional role as a mere lender of money"]; and *Meyers v. Guarantee Sav. &*
 25 *Loan Ass'n*, 79 Cal. App. 3d 307, 312 (1978) [no lender liability when lender did not engage "in
 26 any activity outside the scope of the normal activities of a lender of construction monies"]).

27 Other federal courts have found that a lender owes no duty to the borrower with respect
 28 to a modification. See *Argueta v. J.P. Morgan Chase*, 2011 U.S. Dist. LEXIS 70756, at **14-16

(E.D. Cal. June 30, 2011); *DeLeon v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 112941, 9-12 (N.D. Cal. Oct. 22, 2010) (negligence claim fails because lender had no “duty to Plaintiffs to complete the loan modification process, postpone the foreclosure sale pending completion of such process, and serve a proper notice of sale”); *Coppes v. Wachovia Mortg. Corp.*, 2011 U.S. Dist. LEXIS 42061, at **17-18 (E.D. Cal. Apr. 13, 2011) (court dismissed negligence claim because “Plaintiff has not alleged ‘special circumstances’ plausibly suggesting Wachovia owed her a duty of care because it ‘actively participate[d] in the financed enterprise beyond the domain of the usual money lender.’”).

In this case, there is simply nothing to suggest that Wells Fargo did anything that “exceed[ed] the scope of its conventional role as a mere lender of money.” *Nymark*, 231 Cal. App. 3d at 1096. “[L]oan modification is an activity that is ‘intimately tied to Defendant’s lending role.’” *Johnston v. Ally Fin., Inc.*, 2011 U.S. Dist. LEXIS 83298, at **10-11 (S.D. Cal. July 29, 2011) (quoting *Karimi v. Wells Fargo*, 2011 U.S. Dist. LEXIS 47902, at *7 (C.D. Cal. 2011)) (dismissing negligence claims where “[t]he complaint only alleges that Plaintiffs attempted to enter into an arms-length transaction with [lender] for a loan modification and does not contain any facts showing special circumstances that would require imposing a duty on [lender].”).

In addressing a borrower’s allegations that the lender was negligent in failing to review modification application, the court in *Ortiz v. America’s Servicing Co.* dismissed the negligence claim, finding that the lender did not owe a legal duty of care to borrower. The court explained: “because ‘approving an initial loan is within a lender’s conventional role, loan modification is also intimately tied to Defendant’s lending role,’ and therefore does not give rise to a legal duty between the lender and borrower.” 2012 U.S. Dist. LEXIS 82092, at *15 (C.D. Cal. Jun. 11, 2012).

Moreover, this claim relates to loan servicing and is preempted by HOLA. (Section 4D.)

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14. **PLAINTIFF'S ELDER ABUSE CLAIM FAILS**

A. **The Elder Abuse Claim Is Barred By The Statute Of Limitations**

Plaintiff's claim appears to be based on plaintiff receiving a loan "Plaintiff could never pay off because of her advanced age" (FAC ¶ 114.) The Loan was origination in 2007. (RJN Exh. A.) The claim is therefore barred by the two year statute of limitations. *See*, Cal. Code Civ. Proc. CCP § 335.1. *Benun v. Superior Court*, 123 Cal. App. 4th 113, 126 (2003) ("The [CCP] section 335.1 statute of limitations... is facially applicable to elder abuse actions and provides a two-year limitation period....").⁵

B. **Extending Credit Does Not Constitute Elder Abuse**

Financial abuse is defined in section 15610.30(a) of California's Welfare and Institutions Code, which provides:

Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following: (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both; (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. Cal. Welf. & Inst. Code § 15610.30(a)(1)-(2). A person or entity is "deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith." *Id.* § 15610.30(b).

The mere extension of a loan does not give rise to elder abuse liability against a lender. *Das v. Bank of America, N.A.*, 186 Cal. App. 4th 727, 744 (2010) ("Nothing in appellant's complaints suggests that respondent, in issuing a loan to Kaustubh and transferring his funds at his request, obtained his property for an improper use, or acted in bad faith or with a fraudulent intent."); *Nevis v. Wells Fargo Bank*, 2007 U.S. Dist. LEXIS 65932 (N.D. Cal. Sept. 6, 2007); *McGill v. Wachovia Mortg., FSB Loan*, 2010 U.S. Dist. LEXIS 43393 (E.D. Cal. March 3, 2010) (relying on *Nevis, supra*'s finding that plaintiff's bare allegations that defendant acted in bad faith and intended to defraud plaintiff by inducing her into an unmanageable loan were not

⁵ The Legislature amended section 15657.5 in 2008 and added section 15657.7, which creates a four-year statute of limitations within which to bring an action for damages based on financial abuse of an elder. The amendments, which became effective January 1, 2009, do not apply retroactively. Even if the four year statute of limitations applied the claim is still barred.

specific enough to allege claim of elder abuse.)

Moreover, Welfare and Institutions Code § 15657(c) requires compliance with Civil Code § 3294 before a plaintiff can maintain a cause of action for elder abuse. That means pleading and proving corporate ratification or authorization of the intentional misconduct. To establish corporate ratification of an intentional tort under Civil Code § 3294, a plaintiff must prove that a managing agent approved and ratified the intentional tort. Such a managing agent includes “only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy.” *White v. Ultramar*, 21 Cal. 4th 563, 566-567 (1999). Plaintiff’s complaint alleges nothing even remotely suggesting any officer, director or managing agent ever authorized or ratified any wrongdoing.

15. PLAINTIFF’S FOURTEENTH CLAIM FOR WRONGFUL FORECLOSURE FAILS

Plaintiff relies on California Civil Code § 2924.11(a) to support her “wrongful foreclosure” claim. (FAC ¶120.) Plaintiff bases her claim on the mistaken belief that merely “working on securing a loan modification” prevents foreclosure. (FAC ¶ 121.) This is not the law. Instead, Section 2924.11(a) only applies if “a foreclosure prevention alternative is **approved in writing** . . . [and] The borrower is in compliance with the terms of a written trial or permanent loan modification, forbearance, or repayment plan.” Civil Code § 2924.11(a), emphasis added. Here, there are no allegations in the FAC that plaintiff was approved in writing for a foreclosure prevention alternative.

Moreover, Section 2924.11 is part of the newly enacted Home Owners Bill Of Rights (“HBOR”). Plaintiff cannot bringing any HBOR claim as the Loan was made to a trust and HBOR applies only to borrowers who are “natural person.” Civ. Code § 2920.5(c). Specifically, Section 2920.5 (the definition section for HBOR) states “[u]nless otherwise provided . . . ‘borrower’ means any natural person who is a mortgagor or trustor” Here, the Loan was not made to a natural person, but instead the Loan was made to trust. Specifically, the Loan was made to “Heddi M. Lindberg, Trustee of the Heddi M. Lindberg Revocable Trust. (RJN, Exh. A; FAC, Exh. A.) Therefore, plaintiff’s claims under HBOR fails.

1 **16. PLAINTIFF'S UNFAIR BUSINESS PRACTICES CLAIM IS PLAGUED**
2 **WITH INCURABLE DEFECTS (FIFTEENTH CLAIM)**

3 Plaintiff has failed to allege a violation of California's Unfair Competition Law, Business
4 & Professions Code § 17200, *et seq.* ("UCL"). The UCL precludes any unlawful, unfair, or
5 fraudulent business act or practice. The "unlawful" prong of the UCL applies where a practice is
6 "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or
7 court-made." *Saunders v. Super. Ct.*, 27 Cal. App. 4th 832, 838-839 (1994) (citation omitted).
8 In short, the UCL "borrows" violations of other laws and authorizes a separate action pursuant to
9 the UCL. *See, Farmers Ins. Exch. v. Super. Ct.*, 2 Cal. 4th 377, 393 (1992). The "unfair" prong
10 applies when the practice at issue allegedly violates "the policy or spirit of [anti-trust] laws
11 because its effects are comparable to a violation of the law, or that otherwise significantly
12 threatens or harms competition." *Cell-Tech Comic's, Inc., v. L.A. Cellular Tel. Co.*, 20 Cal. 4th
13 163, 187 (1999). The "fraudulent" prong, post-enactment of Proposition 64, applies where a
14 business act or practice actually misleads a plaintiff. *See, Hall v. Time, Inc.*, 158 Cal. App. 4th
15 847, 849 (2008).

16 To state a UCL violation, plaintiff must allege **specific facts** showing ongoing unlawful,
17 unfair, and fraudulent business acts on the part of the defendant. *Korea Supply Co. v. Lockheed*
18 *Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003); *Hour v. Mali's of Cal., Inc.*, 14 Cal. App. 4th 612,
19 619 (1993). Here, plaintiff has plead no facts to support an UCL claim. Plaintiff merely makes
20 meaningless allegations about a "scheme of selling off overpriced loan" (FAC ¶ 128) and a
21 claim that Wells Fargo disclosed "Private Information of Plaintiff." (FAC ¶ 134.) These
22 allegations do not meet the requirement of Rule 8 or the specificity required for a UCL claim.

23 To the extent plaintiff's UCL claim is based on an alleged failure to contact plaintiff as
24 required by Section 2923.5, it fails. (FAC ¶ 141.) This claim is contradicted by the evidence.
25 First, the notice of default includes a declaration that expressly states that the contact occurred.
26 (FAC, Exh. B; RJN G.) Moreover, the FAC details contact with plaintiff. (FAC ¶¶ 16-18.)

27 To the extent that the UCL claim is based upon the other allegations in the FAC, it fails
28 for the reasons set forth herein.

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN LLP

1 **17. PLAINTIFF'S SIXTEENTH CLAIM FOR CANCELLATION**
2 **OF INSTRUMENT FAILS**

3 Plaintiff alleges that the notice of default is invalid because it was executed by "agent for
4 the beneficiary." (FAC ¶¶ 150-151.) The law applicable at the time of the recording, Civil Code
5 Section 2924(a)(1), expressly allowed an authorized agent of the beneficiary to record the notice
6 of default: "[t]he trustee, mortgagee, or beneficiary, or any of their authorized agents shall first
7 file for record . . . a notice of default." The Courts have confirmed that a notice of default may
8 be executed by the agent for the beneficiary. *Marty v. Wells Fargo Bank*, U.S. Dist. LEXIS
9 29686, at **13-14 (E.D. Cal. Mar. 21, 2011); *Saldade v. Wilshire Credit Corp.*, 711 F. Supp. 2d
10 1126, 1139 (E.D. Cal. 2010).

11 **18. CONCLUSION**

12 For the foregoing reasons, Wells Fargo requests an order granting its motion to dismiss as
13 to all claims without leave to amend.

14 Respectfully submitted,

15 Dated: March 28, 2013

 ANGLIN, FLEWELLING, RASMUSSEN,
 CAMPBELL & TRYTTEN LLP

17 By: /s/ Kenneth A. Franklin

 Kenneth A. Franklin
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18 Attorneys for
19 WELLS FARGO BANK, N.A., successor by
20 merger with Wells Fargo Bank Southwest, N.A.,
21 f/k/a Wachovia Mortgage, FSB, f/k/a World
22 Savings Bank, FSB (sued erroneously as Wells
23 Fargo Bank, N.A., a/k/a Wachovia Mortgage as
24 successor by merger with World Savings Bank
25 FSB) ("Wells Fargo")
26
27
28

ANGLIN FLEWELLING RASMUSSEN CAMPBELL & TRYTTEN LLP

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, declare that I am over the age of 18 and am not a party to this action.
 3 I am employed in the City of Pasadena, California; my business address is Anglin, Flewelling,
 4 Rasmussen, Campbell & Trytten LLP, 199 S. Los Robles Avenue, Suite 600, Pasadena,
 California 91101-2459.

5 On the date below, I served a copy of the foregoing document entitled:

6 **DEFENDANT WELLS FARGO BANK, N.A.'S MOTION TO DISMISS THE FIRST**
 7 **AMENDED COMPLAINT PURSUANT TO F.R.C.P. RULES 9 AND 12(b)(6)**

8 on the interested parties in said case as follows:

9 **Served Electronically Via the Court's CM/ECF System**

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25 I declare under penalty of perjury under the laws of the United States of America that
 26 the foregoing is true and correct. I declare that I am employed in the office of a member of the
 27 Bar of this Court, at whose direction the service was made. This declaration is executed in
 28 Pasadena, California on March 28, 2013.

29 Leslie Coumans

30 (Type or Print Name)

31 /s/ Leslie Coumans

32 (Signature of Declarant)